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Abstract

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KEYWORDS: referendum, slide, drawing board

Limiting Contributions to Referendum Political Committees: Taking Out the First Amendment Slide Rule and Going Back to the Supreme Court's Drawing Board

Cheryl Ryon Eisen*

In response to the revelation of various election abuses during the Watergate investigations,[1] many state and local legislative bodies, as well as Congress, began increasing restrictions on election campaign financing. Among the most controversial regulations are those limiting the dollar amounts of contributions by individual citizens to a single political committee in a referendum campaign. Two recent decisions testing the validity of such laws under the first amendment, one by the Fifth Circuit Court of Appeal in *Let's Help Florida v. McCrary,*[2] and another by the Supreme Court of California in *Citizens Against Rent Control v. City of Berkeley,*[3] make it apparent that the United States Supreme Court must review, clarify, and extend the law it developed in the 1970s in response to first amendment challenges to campaign contribution and expenditure limitations, especially in *Buckley v. Valeo*[4] and *First National Bank of Boston v. Bellotti.*[5]

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1. For an historical overview of the development of federal election campaign finance investigation and regulation, including examples of abuses revealed during the Watergate investigations, see Buckley v. Valeo, 519 F.2d 821, 835-40 (D.C. Cir. 1975).

2. 621 F.2d 195 (5th Cir. 1980), *appeal docketed,* No. 80-970 (U.S. Dec. 8, 1980).

3. 27 Cal. 3d 819, 614 P.2d 742, 167 Cal. Rptr. 84 (1980), *appeal docketed,* No. 80-737 (U.S. Nov. 5, 1980).

4. 424 U.S. 1 (1976) (upholding against first amendment attack the Federal Election Campaign Act's limitation on *contributions* to *candidates* for federal office, but invalidating restrictions on *expenditures* by or on behalf of *candidates*).

5. 435 U.S. 765 (1978) (overturning a Massachusetts statute insofar as it prohibited corporations from making any *contribution or expenditure* to influence the vote

THE RECENT CASES

Let's Help Florida v. McCrary

This case was one of several[6] arising out of a 1978 initiative campaign for a state constitutional amendment to allow casino gambling in a defined area of South Florida. Let's Help Florida, a political committee, challenged a Florida statute[7] which imposed a $3,000 limitation on persons making contributions to a political committee supporting or opposing a statewide referendum issue. The district court declared the statute unconstitutional.[8] On appeal to the Fifth Circuit Court of Appeal, the case was consolidated with *Dade Voters for a Free Choice v. Firestone,*[9] wherein a Florida law[10] placing a $1,000 ceiling on contributions to political committees organized in connection with countywide referendum elections was found invalid.

After disposing of several issues of federal jurisdiction and review,[11] the court addressed appellants' substantive arguments: that the statutes should be upheld as (1) aiding in the prevention of political corruption and (2) promoting disclosure about who are the supporters of referendum campaigns. Responding to the anti-corruption argument, the court determined that

> [t]he state's interest in preventing the actual or apparent corruption of

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on *referendum measures*).

6. *See, e.g.,* Floridians Against Casino Takeover v. Let's Help Fla., 363 So. 2d 337 (Fla. 1978), Let's Help Fla. v. Smathers, 360 So. 2d 496 (Fla. 1st Dist. Ct. App. 1978); Let's Help Fla. v. Smathers, 360 So. 2d 494 (Fla. 1st Dist. Ct. App. 1978).

7. FLA. STAT. § 106.08(1)(d) (1977). This provision was part of a comprehensive election code enacted by the Florida Legislature in 1977 to become effective January 1, 1978. The code did not restrict the number of contributions one could make to different political committees or the total amount of one's independent direct expenditures. FLA. STAT. § 106.011(5) (1977).

8. 453 F. Supp. 1003 (N.D. Fla. 1978).

9. No. 79-770 (N.D. Fla. Mar. 13, 1979). Dade Voters for a Free Choice was a political committee formed to oppose the passage of a county ordinance which would prohibit smoking in public places.

10. FLA. STAT. § 106.08(1)(e) (1977).

11. The court rejected the contentions of the appellants in *Dade Voters* that the district court (1) lacked jurisdiction because no case or controversy existed; (2) should have abstained from hearing the case under the *Younger* abstention doctrine; and (3) should not have granted injunctive relief. 621 F.2d at 198-99.

> *candidates,* which the Supreme Court found so compelling in *Buckley [v. Valeo*[12]], does not justify restrictions upon political contributions in *referendum* elections. . . . Large contributions for publicity by one group or another do not influence the political decisionmakers—in this case, the voters themselves—except in a manner protected by the first amendment.[13]

The court also noted that the Supreme Court in *First National Bank of Boston v. Bellotti*[14] had distinguished between *candidacy* and *referendum* elections in terms of risk of corruption, concluding that the risk "simply is not present"[15] in the referendum context. Similarly, the court rejected appellant's argument that the contribution limitations promoted disclosure, although it recognized that disclosing campaign contributions serves an important state interest.[16] The court wrote:

> Florida can and does effectively promote the disclosure of large contributions through measures that are less harmful to first amendment rights [than imposing contribution limitations]. For example, . . . the Florida Election Code [requires] political committees to register with the state and to file information about each contribution and contributor throughout the campaign. This information is available to the public . . . .[17]

In short, because the contribution limitations added nothing new to the existing disclosure laws to make them more effective, they could not be defended as disclosure measures. Since the statutes did not serve the purpose of preventing political corruption or of promoting disclosure, the district court's decisions, invalidating the acts as abridging important first amendment rights, were affirmed by the Fifth Circuit Court of Appeal.

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12. 424 U.S. 1 (1976). For a more detailed analysis of this case, see text accompanying notes 33-42 *infra.*

13. 621 F.2d at 199-200 (emphasis supplied).

14. 435 U.S. 765 (1978). For a more detailed analysis of this case, see text accompanying notes 43-52 *infra.*

15. *Id.* at 790.

16. 621 F.2d at 200.

17. *Id.* at 200-01.

Citizens Against Rent Control v. City of Berkeley

In this case the Supreme Court of California overturned a California Court of Appeal decision[18] invalidating a Berkeley city ordinance[19] imposing a $250.00 maximum on contributions in support of or in opposition to a ballot measure.[20]

Like the Fifth Circuit Court of Appeal in *Let's Help Florida,* the Supreme Court of California examined the ordinance in light of its proposed effectiveness in preventing corruption and promoting disclosure. Unlike the Fifth Circuit, the California court perceived the Berkeley ordinance as both necessary and effective in achieving those objectives. Viewing the corruption to be guarded against not as the corruption of persons but as the corruption of the initiative and referendum mechanisms, the Court reasoned:

> [T]he domination of these processes by large contributors leaves other citizens with a stilled voice in the very domain of our electoral system set aside for accomplishing the popular will. . . . When large contributors use the power of their purse to overcome the power of reason, they thwart the intended purpose of the initiative or referendum: instead of fostering participation by a greater segment of the electorate, the vision of direct democracy is transformed into a tool of narrow interests.[21]

The court also observed that "the electoral process is . . . corrupted by such contributions because voters lose confidence in our governmental system if they come to believe that only the power of money makes the difference."[22] And it accepted the contribution limitations as a means of promoting disclosure: although section 112 of the Berkeley ordinance required the city to publish in newspapers a list of all contributors making donations of more than fifty dollars to candidates or commit-

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18. 99 Cal. App. 3d 736, 160 Cal. Rptr. 448 (1st Dist. Ct. App. 1979).

19. Berkeley, Cal., Election Reform Act of 1974, § 602, as cited in 27 Cal. 3d at _, 614 P.2d at 746, 167 Cal. Rptr. at 88.

20. The term "ballot measure" is synonymous with the term "referendum issue" and is so-used throughout this article.

21. 27 Cal. 3d at _, 614 P.2d at 746, 167 Cal. Rptr. at 88 (footnote omitted) (citing CROUCH *et al.*, CALIFORNIA GOVERNMENT AND POLITICS 108 (3d ed. 1964) and Nicholson, *Buckley v. Valeo; The Constitutionality of the Federal Election Campaign Act Amendments of 1974,* 1977 WIS. L. REV. 323, 330 (1977).

22. 27 Cal. 3d at _, 614 P.2d at 747, 167 Cal. Rptr. at 89.

tees at least twice during the last seven days of a campaign,[23] the court was concerned that "the campaign propaganda and the identification [of donors] are not simultaneous: inducements are disseminated and voter impressions are formed substantially before the sources of committee financing are revealed."[24]

Having embraced the corruption and disclosure arguments to establish a compelling state interest in imposing contribution limitations, the Supreme Court of California rejected the notion that countervailing first amendment freedoms of expression and association were being impermissibly abridged.[25] The court distinguished *First National Bank of Boston v. Bellotti*[26] which was relied upon by the Fifth Circuit Court of Appeal in *Let's Help Florida* as establishing a distinction between permissible limitations on contributions to *candidates* and impermissible ceilings on contributions to *referendum* campaigns on the basis of potential for corruption.[27] The California court simply noted that "[t]he statute at issue in *Bellotti* totally prohibited . . . expenditures and contributions; the Berkeley ordinance . . . permits contributions . . . in amounts up to $250."[28] Thus, the court not only rejected the candidacy/referendum reading of *Bellotti* in *Let's Help Florida* but further determined that expression and association were not being completely, and therefore impermissibly, repressed, but merely permissibly regulated in the public interest.

Moreover, the Supreme Court of California found the compelling state interests of preventing corruption and promoting disclosure were served by the Berkeley ordinance in a reasonable manner.[29] The district

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23. *Id.* at _, 614 P.2d at 753, 167 Cal. Rptr. at 95.

24. *Id.* at _, 614 P.2d at 749, 167 Cal. Rptr. at 91. Though the Florida disclosure statute found by the Fifth Circuit Court of Appeals to be more effective than contributions limititations in *Let's Help Fla.* (FLA. STAT. §§ 106.03,.07 (1977)) did not require publication of the names of contributors, political committees were required to file contribution and expenditure reports quarterly from the time the campaign treasurer was appointed and, following the last day for qualifying for office, either weekly or bi-weekly depending on the scope of the election in question (statewide vs. non-statewide). *Id.* § 106.07(1).

25. 27 Cal. 3d at _, 614 P.2d at 748-49, 167 Cal. Rptr. at 90-91.

26. 435 U.S. 765 (1978).

27. 621 F.2d at 200.

28. 27 Cal. 3d at _, 614 P.2d at 748, 167 Cal. Rptr. at 90.

29. The court rejected the argument that the $250 ceiling was too low: "The

court decision invalidating the measure was reversed, four to three.[30]

THE BACKGROUND: BUCKLEY AND BELLOTTI

The Supreme Court predicate for the *Let's Help Florida* and *Berkeley* decisions provides no ready answer as to which court, the Fifth Circuit Court of Appeal or the Supreme Court of California, has decided correctly the validity of limitations on contributions to referendum political committees. A brief review of *Buckley v. Valeo*[31] and *First National Bank of Boston v. Bellotti,*[32] relied upon by both courts in reaching their opposite conclusions, will show the complexity of the issue and the potential for confusion and conflict created by the Supreme Court in those decisions.

Buckley v. Valeo

The Supreme Court opinion in this 1976 case has since been the point of departure for analysis of the validity of a variety of federal, state, and local campaign finance regulations. At issue in *Buckley* were provisions of the Federal Election Campaign Act of 1971,[33] limiting (1) *contributions* by individuals or groups to *candidates* for federal elective office[34] and contributions to any such candidates by political committees[35] and (2) *expenditures* by individuals or groups advocating the election or defeat of such *candidates*[36] as well as expenditures by the

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major proportion of CARC's [Citizens Against Rent Control] funds came in amounts under the ceiling; moreover, the few contributions that were larger were considerably above the ceiling and hence would not have been aided by a modest upward adjustment." *Id.* at _, 614 P.2d at 749, 167 Cal. Rptr. at 91.

30. Justice Richardson wrote a cogent and convincing dissenting opinion, *Id.* at _, 614 P.2d at 750-55, 167 Cal. Rptr. at 92-97, with which Justices Clark and Manuel concurred.

31. 424 U.S. 1 (1976).

32. 435 U.S. 765 (1978).

33. Federal Election Campaign Act of 1971, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263.

34. 18 U.S.C. § 608(b)(1) (1970 & Supp. IV 1974) (imposing a $1,000 limit).

35. 18 U.S.C. § 608(b)(2) (1970 & Supp. IV 1974) (imposing a $5,000 limit). A $25,000 limitation on total contributions by any contributor (individual, group, or political committee) (18 U.S.C. § 608(b)(3) (1970 & Supp. IV 1974) was also contested.

36. 18 U.S.C. § 608(e)(1) (1970 & Supp. IV 1974) (imposing a $1,000 limit).

candidates themselves[37] and their own campaign organizations.[38] The reporting and disclosure requirements of the Act[39] were also contested.[40]

The Court held that the *contribution* limitations at issue were not unconstitutional but were supported by substantial governmental interests in limiting corruption and the appearance of corruption in federal elections.[41] As to the *expenditure* limitations, the Court found these unconstitutional as impermissible burdens on the right of free expression under the first amendment which could not be sustained on the basis of governmental interests in preventing the actuality or appearance of corruption or in equalizing the resources of candidates.[42]

Thus, a cursory reading of *Buckley* would dictate acceptance of the Supreme Court of California's view in *Berkeley* that the city ordinance was not invalid because it was a contribution limitation, not an expenditure limitation, and contribution limitations prevent corruption. But an examination of *First National Bank of Boston v. Bellotti* leads

37. 18 U.S.C. § 608(a)(1) (1970 & Supp. IV 1974) (dollar limit depending on office involved).

38. 18 U.S.C. § 608(c) (1970 & Supp. IV 1974) (dollar limit depending on office involved).

39. 2 U.S.C. §§ 431 *et seq.* (1970 & Supp. IV 1974) (requiring political committees to report to the Federal Election Commission the names of persons contributing more than $10, with the names of those contributing more than $100 in a calendar year being subject to public inspection) and 2 U.S.C. § 434(e) (1970 & Supp. IV. 1974) (requiring every person or group other than a political committee or candidate who makes political contributions or expenditures exceeding $100 in a calendar year, other than by contribution to a political committee or candidate, to file a statement with the Federal Election Commission).

40. Two other principal holdings in *Buckley* are not relevant here: (1) that the provisions of the Internal Revenue Code for public financing of presidential election campaigns were not unconstitutional as being contrary to the art. I, sec. 8 general welfare clause or the first or fifth amendments or as invidiously discriminating against minority parties or their candidates or candidates not running in party primaries, 424 U.S. at 85-109; (2) that the principle of separation of powers contained in the art. I, sec. 1 appointments clause was violated by the method of appointment of the members of the Federal Election Commission considering its rule making, adjudicatory and enforcement powers (though de facto validity would be given to the Commission's past acts), 424 U.S. at 109-143.

41. *Id.* at 58.

42. *Id.* at 58-59. The Court also decided that the reporting and disclosure requirements were valid. *Id.* at 84.

to the conclusion that a less superficial analysis of *Buckley* will be required to resolve the question of the validity of limitations on contributions to political committees in *referendum* campaigns.

First National Bank of Boston v. Bellotti

Although *Let's Help Florida* and *Berkeley* were, like *Buckley, contribution* cases, *Bellotti* was a 1978 *expenditure* case. Unlike *Buckley, Bellotti* was a *referendum* case, not a *candidacy* case. The Massachusetts statute at issue prohibited corporations from making contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation."[43] The law further provided that "[n]o question submitted to the voters solely concerning the taxation of the income . . . of individuals shall be deemed materially to affect the property, business or assets of the corporation."[44] The appellants, two national banks and three business corporations, wanted to *spend* money to publicize their opposition to a proposed state constitutional amendment to allow the legislature to impose a personal income tax.

Although the Massachusetts Supreme Judicial Court had concerned itself principally with the question of whether and to what extent corporations have first amendment rights,[45] the Supreme Court took a less subjective approach:

> We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vin-

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43. MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977). In addition to prohibiting corporate contributions or expenditures for the purpose of influencing the vote on referenda, section 8 proscribed contributions and expenditures in candidacy elections.

> The importance of the governmental interest in preventing [corruption of elected representatives through the creation of political debts in candidacy elections] has never been doubted. The case before us presents no comparable problem, and our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office.

435 U.S. at 788 n.26.

44. MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977).

45. 371 Mass. 773, 359 N.E.2d 1262 (1977).

> dication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amendment rights . . . . Instead, the question must be whether [the statute] abridges expression that the First Amendment was meant to protect.[46]

The Court was quick to determine that "[t]he speech proposed by appellants is at the heart of the First Amendment's protection"[47] and "[i]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech."[48]

The state advanced as one of its principal justifications for the prohibition of corporate speech in the referendum context "the State's interest in sustaining the active role of the individual citizen in the electoral process and thereby preventing diminution of the citizen's confidence in government."[49] Pointing out that the state could prevail with this argument only upon showing it to represent a compelling subordinating interest in regulating protected speech in pursuit of which a method "closely drawn to avoid unnecessary abridgement" of the right to engage in that speech had been used,[50] the Court noted that the State's assertion that there is danger in allowing corporate participation in the discussion of a referendum issue rested upon the unsupported assumption that "such participation would exert an undue influence on the outcome of a referendum vote and—in the end—destroy the confidence of the people in the democratic process and the integrity of governnment."[51] The Court concluded:

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46. 435 U.S. at 776.

47. *Id.*

48. *Id.* at 777.

49. *Id.* at 787. The state also asserted a compelling interest in protecting the rights of corporate shareholders whose views were different from those expressed by the management on behalf of the corporation. The Court concluded that "[a]ssuming, arguendo, that protection of shareholders is a 'compelling' interest under the circumstances of this case, we find 'no substantially relevant correlation between the governmental interest asserted and the State's effort' to prohibit appellants from speaking" considering the overinclusiveness and underinclusiveness of the statute. *Id.* at 795 (quoting Shelton v. Tucker, 364 U.S. 479, 485 (1960)).

50. 435 U.S. at 786 (quoting Buckley v. Valeo, 424 U.S. at 25).

51. 435 U.S. at 789.

> If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes . . ., these arguments would merit our consideration. . . . But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government.
>
> Nor are appellee's arguments inherently persuasive or supported by the precedents of this Court. Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote . . . . But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution "protects expression which is eloquent no less than that which is unconvincing. . . ." We noted only recently that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." *Buckley, supra*, at 48-49. Moreover, the people . . . are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider . . . the source and creditibility of the advocate.[52]

Thus, the Court relied not so much on the fact that an expenditure was at issue but rather emphasized that it was a referendum and not a candidacy election, that was at stake. This was certainly the Fifth Circuit's reading of *Bellotti* in *Let's Help Florida.*

SYNTHESIS: BUCKLEY, BELLOTTI, LET'S HELP FLORIDA, BERKELEY

The principal cases indicate that the questions which must be answered in determining the validity of limitations on contributions to political committees supporting or opposing ballot measures are these:

(1) For the purpose of first amendment protection, is a contribution to a referendum political committee political expression or merely a manifestation of political association?

(2) What state interests, if any, are sufficiently compelling to with-

52. *Id.* at 789-92 (citations and footnotes omitted).

stand the Supreme Court's strict scrutiny of laws infringing on first amendment rights by imposing ceilings on contributions to referendum political committees?

(3) Assuming a compelling state interest in monitoring referendum campaigns, are limitations on contributions to political committees the most effective and least restrictive means of serving such an interest?

1. Is a Contribution to a Referendum Political Committee "Political Expression" or "Political Association?"

Both political expression[53] and political association[54] are forms of "speech" protected by the first amendment. But what the Supreme Court in *Buckley* saw as the symbolic nature of a campaign contribution,[55] as opposed to a direct expenditure of money to express one's views (for example, purchasing newspaper space for a political advertisement), seems somehow to diminish the "political expression" aspect of such contributions. That is not to say that "the dependence of a communication on the expenditure of money operates itself to introduce

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53. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The first amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 . . . (1957). . . . "[T]here is practically universal agreement that a major purpose of [the] Amendment was to protect the free discussion of governmental affairs . . . ." Mills v. Alabama, 384 U.S. 214, 218 (1966).

Buckley v. Valeo, 424 U.S. 1, 14 (1976).

54. The First Amendment protects political association as well as political expression. The constitutional right of association explicated in *NAACP v. Alabama,* 357 U.S. 449, 460 (1958), stemmed from the Court's recognition that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee " 'freedom to associate with others for the common advancement of political beliefs and ideas,' " . . . . Kusper v. Pontikes, 414 U.S. 51, 56, 57 (1973), *quoted in Cousins v. Wigoda,* 419 U.S. 477, 487 (1975).

Id. at 15.

55. *Id.* at 21.

a nonspeech element or to reduce the exacting scrutiny required by the First Amendment,"[56] but

> [a] limitation on the amount of money a person may give to a candidate or campaign organization . . . involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe [upon] the contributor's freedom to discuss candidates and issues.[57]

Thus, according to *Buckley,* contribution "speech" partakes more of freedom of association than of freedom of expression in first amendment analysis: "the primary First Amendment problem raised by . . . contribution limitations is their restriction of one aspect of the contributor's freedom of political association."[58] And though measures curtailing the freedom to associate demand the closest scrutiny,[59] "[e]ven a 'significant intereference' with protected rights of political association" may be sustained if the State demonstrates a sufficiently important interest . . . ."[60]

It is difficult to resist the conclusion that although both political expression and political association are fundamental rights, contributions to referendum political committees will fare better for the purpose of first amendment protection if such contributions are seen primarily as a non-symbolic form of political expression. Indeed, in *Buckley* limitations on symbolic, associational campaign contributions were sustained but limitations on campaign expenditures, described as "limitations on core First Amendment rights of political expression,"[61] were declared invalid.

Should contributions to referendum political committees be characterized primarily as political expression for first amendment purposes? In a recent Ninth Circuit Court of Appeal case, *California*

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56. *Id.* at 16.
57. *Id.* at 21.
58. *Id.* at 24-25.
59. N.A.A.C.P. v. Alabama, 357 U.S. 449, 460-61 (1958).
60. 424 U.S. at 25 (citing Cousins v. Wigoda, 419 U.S. 477, 488 (1975), N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1963), and Shelton v. Tucker, 364 U.S. 479, 488 (1960)).
61. 424 U.S. at 44-45.

Medical Association v. Federal Election Commission,[62] (hereinafter *CMA*) Judge Wallace, dissenting, found contributions to multi-*candidate* political committees more analagous to campaign expenditures (expression) than to campaign contributions (association)[63] for reasons which are analytically applicable in the referendum political committee context. At issue in *CMA* was the constitutionality of limits on contributions to political action committees[64] under the Federal Election Campaign Act as amended in 1976.[65]After the Supreme Court upheld the Act's $1,000 limitation on individual's contributions to candidates for federal office in *Buckley,* Congress, "as a matter of legislative grace, . . . opened a wider avenue by which individuals could channel funds to candidates: any person, including both natural persons and various kinds of organizations, could contribute up to $5,000 to multi-candidate political committees which in turn could contribute up to $5,000 to each candidate."[66] In *CMA,* CALPAC was a multi-candidate political committee affiliated with the California Medical Association.

Comparing the expression and association interests affected by the contribution limitations sustained in *Buckley* with those affected by the Act's limitation on contributions to political committees, Judge Wallace found the latter to be "more substantial":[67]

> In *Buckley* the contribution limitations governed contributions from a supporter to a candidate. The communication inhering in such contribu-

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62. No. 79-4426 (9th Cir. May 23, 1980), *appeal docketed,* No. 79-1952, (U.S. June 12, 1980).

63. No. 79-4426, slip op. at 3405.

64. The phrase "political action committee" may be of indeterminate origin, but it appears to have gained currency by 1944 when it was used as a term of art by the Congressional Special Committees to Investigate Campaign Expenditures, H.R. REP. No. 2093, 78th Cong., 2d Sess. (1944); S. REP. No. 101, 79th Cong., 1st Sess. (1945). It now has a meaning fixed by federal law. 2 U.S.C. § 441a(a)(4) (1976).

Kiley, *Pacing The Burger Court: The Corporate Right to Speak and the Public Right to Hear After First National Bank v. Bellotti,* 22 ARIZ. L. REV. 427, 428 n.6 (1980).

65. Pub. L. No. 94-283, 90 Stat. 475 (_). The $5,000 limitation on contributions to political committees was codified as 2 U.S.C. § 441a(a)(1)(C) (1976).

66. No. 79-4426, slip op. at 3375 (footnote omitted).

67. *Id.* at 3404.

> tions is simply that the contributor "supports" the candidate and his views. The Court found that this "symbolic expression of support" . . . is adequately communicated by the act of contribution: the contribution's size is of "marginal" importance. . . .
>
> In contrast, ... [t]he object of an unincorporated association's donations to a political committee is not merely to indicate "support" for the committee's views, but to use the instrument of a political action committee to voice its own ideas. Whereas in *Buckley* [where the contributions were to the candidates themselves] "the transformation of contributions into political debate [involved] speech by someone other than the contributor," . . . here this transformation is accomplished by the committee donors themselves, through a committee which, in large or small measure, they control.[68]

Judge Wallace went on to point out that a limitation on donations to political committees ultimately affects not only the total funds available for *contributions* to candidates, but also the amount available for direct *expenditure* by the committee:[69]

> It is by repeatedly forgetting this incontestable fact that the majority erroneously likens the . . . donation restriction to the contribution limitations upheld in *Buckley*. [The Act] imposes [quoting *Buckley*] "direct and substantial restraints on the quantity" of . . . "political speech." . . . The individual speech interests are therefore comparable to those affected by the expenditure limitations invalidated in *Buckley*.[70]

It may be argued here that the "limitation on funds available for expenditure" rationale should be de-emphasized because, since *Buckley*, campaign contributors remain free to make their own direct expenditures in any amount they choose. However, freedom of association is implicated here:

> Only in conjunction with outside donors will some unincorporated associations be able to aggregate sufficient funds and expertise to compete effectively in the political marketplace with other more affluent "persons" capable of huge personal expenditures. . . . [This] restriction . . .

68. *Id.* (citation omitted).
69. *Id.*
70. *Id.* at 3404-05 (footnote and citation omitted).

goes to the heart of the associational right.[71]

Whatever criticisms or distinctions can be raised in opposition to Judge Wallace's dissenting opinion in *CMA* considering the potential for corruption in the candidacy context,[72] the opinion is well-tailored to make the point that contributions by individuals to *referendum* political committees should be treated as direct expenditures, as pure speech political *expression,* for first amendment purposes. Paraphrasing Judge Wright,[73] the object of an individual citizen's donation to a political committee is not merely to indicate support for or opposition to the committee's views on a ballot measure, but to use the political committee to voice his or her own ideas. Although an individual contributor does not have complete control over the precise "speech" which will emanate from the political committee regarding the ballot measure in question, the issue to be spoken to is clearly established in advance of the donation, as well as the position being supported by the committee, positive or negative. Although such contributors are clearly free to *directly expend* as much money as they are willing and able in favor of or in opposition to a referendum issue, again paraphrasing Judge Wallace,[74] only in conjunction with other donors will some citizens be able to aggregate sufficient funds to compete effectively in the political mar-

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71. *Id.* at 3405.

72. The 1976 amendments gave political action committees great and unusual powers in comparison to either candidates or individuals: Political action committees are unlimited in the total amounts of money they receive, expend, and contribute to candidates. To vest such extraordinary power in political action committees, without some reasonable limits such as section 441a(a)(1)(C) on how they can collect money, would be to create novel and potentially enormous opportunities for corruption. As one study has concluded, even as limited by section 441a(a)(1)(C), political action committees have become vast, unaccountable, and low visibility centers of electoral influence that effectively detach candidates from their nominal geographic constituencies. *See* Institute of Politics, John F. Kennedy School of Government, Harvard University, An Analysis of the Impact of the Federal Election Campaign Act, 1972-78, Prepared for the House Comm. on House Admin., 96th Cong., 1st Sess. 4-5 (Comm. Print 1979) . . . .

No. 79-4426, slip op. at 3377.

73. *See* text accompanying note 68 *supra.*

74. *See* text accompanying note 71 *supra.*

ketplace with other more affluent individuals capable of huge personal expenditures. Considering the nature of the election at stake (ballot measure versus candidacy), the referendum political committee will not itself be making contributions, only expenditures to publicize its support or opposition to a concept, not a potentially corruptible candidate. Thus, the referendum political committee serves as a mechanism for effectively pooling expenditure capital for the purpose of first amendment protected political expression.

Recognizing a first amendment right to make unlimited contributions to referendum political committees also serves an important public interest: the public's right to hear. In *Bellotti,* the Supreme Court emphasized that it was the nature of the speech proposed that commanded first amendment protection:[75] "The Court has declared . . . that 'speech concerning public affairs is more than self-expression; it is the essence of self-government.' . . . And self-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.' . . . "[76] The Court also noted that "freedom of expression has particular significance with respect to government because '[i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.' "[77] Surely political communication regarding an issue of such governmental importance as to be the subject of a referendum goes to the "essence of self-government" such that financial limitations on such expression would be in obvious violation of the fundamental purpose for which the first amendment was historically intended.[78]

2. *What State Interests Are "Compelling"?*

The Supreme Court has consistently recognized two state interests as sufficiently compelling to allow regulation of political contributions and expenditures: preservation of (1) the integrity of the representative

75. *See* 435 U.S. at 776-77.

76. *Id.* at 777 n.12 (citations omitted).

77. *Id.* n.11.

78. For a discussion of the historical relationship between the first amendment and the public discussion of governmental affairs, see T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966) and A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (both cited in *Bellotti,* 435 U.S. at 777 n.11).

system of government and (2) the public's confidence in that system of government.[79] These interests have been expressed in various ways ("prevention of corruption and the appearance of corruption,"[80] ["preservation of] the integrity of the electoral process,"[81] ["sustaining] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government"[82]), but the underlying principles remain the same. Of course, a mere assertion of these interests is insufficient if not inherently persuasive or supported by record or legislative findings, or by Supreme Court precedents.[83]

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79. *See* Buckley, 424 U.S. at 26-27.

80. *Id.* at 25.

81. *Bellotti,* 435 U.S. at 788.

82. *Id.* at 788-89 (citing United States v. Automobile Workers, 352 U.S. 567, 575 (1957)).

83. *See Bellotti* as quoted in text accompanying note 52 *supra.*

In *Buckley,* the Supreme Court relied on legislative findings to constitutionally support the Federal Election Campaign Act's $1,000 limitation on contributions to candidates:

> To the extent that large contributions are given to secure political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election [in the Watergate investigations] demonstrate that the problem is not an illusory one.

424 U.S. at 26-27 (footnote omitted). *See also* note 1, *supra.*

In striking down the Act's $1,000 limitation on independent *expenditures* in support of a candidate, the Court made no reference to any record or legislative findings or Supreme Court precedents supporting the limitation and apparently found arguments advanced by the Act's proponents inherently unpersuasive:

> The parties defending §608(e)(1) [limiting expenditures] contend that it is necessary to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities. They argue that expenditures controlled by or coordinated with the candidate and his campaign might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse. Yet such controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act. Section 608(b)'s contribution ceilings rather than §608(e)(1)'s independent expenditure limitation prevent . . . [such] disguised contributions. . . . Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate . . . not only

Is there any basis for finding a compelling state interest in limiting contributions in the referendum political committee context which would justify infringement on contributors' first amendment rights of political expression and association? In both *Let's Help Florida*[84] and *Berkeley*,[85] the proponents of the regulations limiting such contributions stressed their importance in preventing corruption and promoting disclosure of the identity of campaign contributors, two variations on the integrity of the system/public confidence theme. Although the Fifth Circuit Court of Appeal in *Let's Help Florida* followed *Bellotti* in concluding that, with regard to referendum elections, statutory restrictions upon political contributions cannot be justified as a means for preventing political corruption because there are no candidates to be corrupted,[86] the Supreme Court of California in *Berkeley* merged the integrity of the system/public confidence interests to define the corruption to be guarded against as the corruption of the purpose of the initiative/referendum mechanism itself and the electoral process in general.[87] The California court relied heavily on "[c]ommentators on our political scene"[88] to find a trend toward loss of confidence in the political system and apathy in elections which limitations on contributions to referendum political committees might reverse by "assuring the voters that their vote and their participation, whether in the form of money or services, are significant"[89] and concluded that this interest, served by the ordinance, should be recognized as compelling.[90]

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undermines the value of the expenditures to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

424 U.S. at 46-47 (footnote omitted).

Likewise, in *Bellotti*, the Court found that the state's assertion that there is danger in allowing corporate participation in the discussion of a referendum issue rested upon the unsupported assumption that "such participation would exert an undue influence on the outcome of a referendum vote and,—in the end—destroy the confidence of the people in the democratic process and the integrity of government." 435 U.S. at 789.

84. *See* text accompanying notes 11-15 *supra.*

85. *See* text accompanying notes 21-22 *supra.*

86. 621 F.2d at 199-200.

87. 27 Cal. 3d at _, 614 P.2d at 746, 167 Cal. Rptr. at 88.

88. *Id.* at _, 614 P.2d at 747, 167 Cal. Rptr. at 89.

89. *Id.* at _, 614 P.2d at 747-48, 167 Cal. Rptr. at 89-90.

90. *Id.* at _, 614 P.2d at 748, 167 Cal. Rptr. at 90.

Will the United States Supreme Court agree? *Bellotti* ("[t]he risk of corruption perceived in candidate elections . . . simply is not present in a popular vote on a public issue"[91]) indicates a negative answer, notwithstanding the distinction drawn between the statute in *Bellotti* and the ordinance in *Berkeley* by the California court: "[t]he statute at issue in *Bellotti* totally prohibited . . . expenditures and contributions; the Berkeley ordinance . . . permits contributions . . . in amounts up to $250."[92] This distinction does not take into account the fact that the provisions of the Federal Election Campaign Act found unconstitutional in *Buckley* were financial *limitations,* not *prohibitions.* Thus, particularly if the previously advanced principle is accepted—that contributions to referendum political committees, like *Bellotti's* referendum *expenditures,* are pure speech political expression which cannot be dollar-limited according to *Buckley*—the *Berkeley* explanation of *Bellotti* creates a distinction without a difference under the first amendment.

Even assuming that restoring public confidence in the political system and stemming voter apathy are compelling anti-corruption interests, "[i]t is noteworthy that it [was] not the *fact* of a danger but the *potential* of a danger that alone generates the *compelling* interest found by the majority [in *Berkeley*]."[93] Thus, Justice Richardson, dissenting, criticized the *Berkeley* majority for basing its finding of a compelling state interest on a "wholly untested political hypothesis [which was] not based upon any record but rather upon the opinions and conclusions of 'commentators on our political scene,' 'a political scientist,' [and] a 'student of the California initiative process.' "[94] Justice Richardson continued:

> The rationale for the ordinance's restrictions, viewed as sufficient by the majority, is the danger of "corruption" of the initiative process through this infusion of unlimited sums of money by "large contributors" . . . favoring or opposing a ballot measure. This, the majority argues, will destroy the electorate's "confidence in our political system." . . . In the absence, however, of some affirmative showing "by record or legisla-

91. 435 U.S. at 790 (citations omitted).
92. 27 Cal. 3d at _, 614 P.2d at 748, 167 Cal. Rptr. at 90.
93. *Id.* at _, 614 P.2d at 751, 167 Cal. Rptr. at 93 (emphasis in original).
94. *Id.*

> tive finding" this precise reasoning, central to the majority opinion, was flatly rejected, as to corporate contributors, by the *Bellotti* court . . . in these words: "[T]here has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts or that there has been any threat to the confidence of the citizenry in government." Similarly, there has been "no showing" whatever that large contributors, corporate or otherwise, have thwarted or perverted the initiative in California, which at present appears to be alive and well and increasingly used.[95]

Accordingly, even if the California court's definition of "corruption" in the referendum context gains acceptance, it is possible the Supreme Court will not find that the Berkeley ordinance serves a proven compelling anti-corruption interest.

3. What Form of Regulation is Most Effective and Least Restrictive?

Clearly, one of the most effective means of protecting the political process from the corruption of money is to place ceilings on contributions and expenditures of all kinds. But because of the fundamental first amendment implications of such ceilings, the test for the validity of those measures is not whether they are the most effective means of protecting against corruption but whether they are the least restrictive method of effectively accomplishing that end, "closely drawn to avoid unnecessary abridgment"[96] of first amendment rights.

Accepting the notion that referendum elections do not present the same opportunities for quid pro quo corruption as candidacy elections, and thus limitations on contributions to referendum political committees unnecessarily infringe on first amendment rights, does not preclude some other form of regulation. For example, in *Let's Help Florida* the Fifth Circuit Court of Appeal recognized Florida's disclosure laws as effective against corruption of the initiative/referendum process, since they allow the public an opportunity to evaluate the merits of a ballot measure with knowledge of its supporters and opponents.[97] The protection of the electoral system afforded by disclosure measures is not abso-

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95. *Id.* at _, 614 P.2d at 752, 167 Cal. Rptr. at 94.
96. *Bellotti,* 435 U.S. at 786 (quoting *Buckley,* 424 U.S. at 25).
97. *See* 621 F.2d at 200-01.

lute, however. The information made public is just that—information. It is the responsibility of the voter to use this data in conjunction with other information about an issue to make a reasoned decision.

In contrast, the Supreme Court of California regarded the Berkeley disclosure provision as too little, too late, to allow the public reasonable opportunity to use facts made public by disclosure to make rational decisions.[98] Interestingly, the Berkeley ordinance required newspaper *publication* (twice during the last seven days of a referendum campaign) of contributor information,[99] whereas the Florida law required mainly *reporting* of financial information to the Secretary of State (which information then became public record).[100]

Are disclosure laws like those on the books in Florida and Berkeley, California, sufficiently effective against corruption of the referendum process? The answer cannot be objective. In the final analysis it must be tied to the basic political philosophy of those asked to respond. The Fifth Circuit Court of Appeal's attitude toward the Florida disclosure requirement reflects a more conservative view of the relationship between a citizen and his/her government than that held by the Supreme Court of California. Even though the California court may be correct in its observation that "inducements are disseminated and voter impressions are formed substantially before the sources of committee financing are revealed,"[101] should one citizen's participation in the political process be sacrificed to another citizen's political naivete'? Stated another way, to what lengths should government go to see to it that citizens fully inform themselves before making political decisions? In light of the first amendment implications of limiting contributions to referendum political committees, a more constitutionally acceptable method of improving public awareness would be to rewrite the disclosure laws, a task which the Supreme Court can happily note falls to the legislatures, not the courts.

CONCLUSION

It would be easy to succumb to the symmetry of upholding limita-

98. *See* 27 Cal. 3d at _, 614 P.2d at 749, 167 Cal. Rptr. at 91.
99. *Id.* at _, 614 P.2d at 753, 167 Cal. Rptr. at 95.
100. *See* FLA. STAT. §§ 106.03, .07 (1977).
101. 27 Cal. 3d at _, 614 P.2d at 749, 167 Cal. Rptr. at 91.

tions on political contributions while striking down limitations on political expenditures without regard to the nature of the election at stake (referendum versus candidacy) or, in the case of contributions, the identity of the recipient (political committee versus candidate or candidate's campaign organization). But the stringent demands of the first amendment on those who would seek to balance its protections against state interests do not permit such unsophisticated treatment.

If the Supreme Court overrules the California court on the theory that there is *no* risk of corruption in the referendum context, the validity of disclosure laws in that setting must be questioned. (If they do not act as anti-corruption measures, what compelling state interest do disclosure laws serve?) If the Court accepts the California court's definition of "corruption" in connection with ballot measures (corruption of the process), the integrity of disclosure laws will be preserved; but if the Court goes the second mile and recognizes contribution limitations as a valid method of avoiding that corruption, a precedent requiring a case-by-case analysis of contribution limitations will be established, necessitating inquiry in each instance as to whether there was a demonstrable threat to the referendum process which required legislative action limiting contributions to political committees.

Recognizing contributions to referendum political committees as pure speech political expression establishes neither the "no risk of corruption" precedent nor the "case-by-case corruption of the process" precedent but does create other problems including the question of the validity of limitations on contributions to *candidate* political action committes, which the Court may resolve in *California Medical Association v. Federal Election Commission,*[102] and the issue of the validity of limitations on contributions to political committees supporting ***both*** candidates and ballot measures. Nonetheless, this appears to be the most desirable judicial approach because it would preserve fundamental first amendment rights while leaving legislative bodies free to impose reasonable disclosure requirements and other protections against abuse of the referendum process.

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Perhaps this discussion demonstrates that the Supreme Court's resolution of the conflict between the first amendment and election

102. *See* text accompanying notes 62-66 *supra.*

finance laws can still be only piecemeal at best, notwithstanding the Court's best efforts in *Buckley* and *Bellotti*. Nonetheless, the yearning for one final blueprint still lingers, especially in the souls of advisors to Congressional, state, and local lawmakers.